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No. 575

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,195

ARIZONA WESTERN INSURANCE COMPANY,
Plaintiff-Appellant,

vs.

L. L. CONSTANTIN & CO.,
Defendant,

and

S. & C. TRADING CO., INC.,
Intervenor.

Civil Action

On Appeal from Judgment of the United States District Court for the District of New Jersey

Sat Below:
Meaney, U.S.D.J.
(No. 536-56)

BRIEF FOR APPELLANT AND JOINT APPENDIX

KOENIGSBERG AND ROSSMOORE,
Attorneys for Plaintiff-Appellant,
60 Park Place,
Newark 2, New Jersey.

SAMUEL M. KOENIGSBERG,
Of Counsel.

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Statement of the Questions Involved

1. Where a corporation's charter and its preferred stock certificate provide that the corporation is "bound to pay * * * out of net profits * * * a fixed yearly dividend" in a stated sum, does not the provision supersede the discretion normally reserved for directors in the declaration of dividends, and instead make a dividend out of net profits mandatory?

2. Was there any restriction on the corporation's ability to pay dividends on its preferred stock, on the facts here, by reason of the fact that the source for the payment of such dividends was limited to the corporation's "net profits"?

Statement of the Case

The portion of the action here under review was brought to recover dividends on preferred stock in the defendant held by the plaintiff. The defendant's charter and preferred stock certificate provided that it was "bound to pay * * * out of net profits * * * a fixed yearly dividend of 50¢ per share, payable semi-annually." In 1955 net profits to pay such a dividend were amply available and the plaintiff held the preferred stock during the entire year, but the defendant neither declared nor paid any dividend on its preferred stock for the year. The court below, holding the dividend to be payable only in the directors' discretion notwithstanding the language of the charter and stock certificate, granted defendant's motion for summary judgment and judgment on the pleadings, and it denied plaintiff's motion for summary judgment. The appeal is from this ruling.

Statement of Facts

The plaintiff was the holder of 10,000 shares of preferred stock in the defendant from on or about October 1, 1954 to on or about February 1, 1956 (3a).* The amendment of December 2, 1952 to defendant's certificate of incorporation which authorized the issuance of that stock provided in pertinent part (3a),

> "The holders of the preferred stock shall be entitled to receive, and the Company shall be bound to pay thereon, but only out of the net profits of the Company, a fixed yearly dividend of Fifty Cents (50¢) per share, payable semi-annually."

An identical provision appeared in the stock certificate held by plaintiff (4a-5a).

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* Page numbers followed by "a" refer to pages of the Joint Appendix.

At a meeting of the board of directors of the defendant on December 28, 1954, a resolution was duly adopted, reading—

> "RESOLVED, that a dividend be declared on preferred stock at the interest rate of 5% to all its stockholders of record on December 30, 1954, payable January 15, 1955" (5a).

At the declared rate of 5% (equivalent to the 50¢ per share provided in the charter and stock certificate), the plaintiff was entitled to dividends of $5,000 on its 10,000 shares of preferred stock. However, although the dividend was paid by the defendant on certain shares of its outstanding preferred (5a), it was not paid on the 10,000 shares held by the plaintiff (5a). Nor did the plaintiff receive any dividends for the year 1955, although it was a stockholder of record during the entire year and for a month thereafter (6a).

Invoking the diversity jurisdiction of the court—the plaintiff being an Arizona corporation and the defendant a New Jersey corporation (3a)—the plaintiff, after demand for the dividends (6a) instituted suit in the court below. By its amended complaint the plaintiff alleged *inter alia* the facts as to its record ownership as above set forth and the non-payment to it by defendant of the 50¢ per share dividend declared in December 28, 1954, payable January 15, 1955 to stockholders of record December 30, 1954. This claim was embraced in the first count of the amended complaint (6a).

The second count alleged in substance a declaration of a similar 50¢ dividend and a non-payment thereof in 1955. The third count alleged in substance that, under the terms of the defendant's amended certificate of incorporation and of the preferred stock certificate held by the plaintiff, the defendant was bound to pay to the plaintiff, but only out of net profits, a fixed yearly dividend of 50¢ per share,

payable semi-annually, and that net profits were available for such dividend. The amended complaint recited that the plaintiff had demanded the dividends and that payment had been refused, and it sought a judgment of $5,000 and interest for the unpaid dividend allegedly declared for 1954 (first count) and $5,000 and interest for the unpaid dividend which was allegedly either declared by the defendant (second count) or which defendant was bound to pay (third count) for 1955 (6a).

The answer recited, in substance that the plaintiff was no longer a stockholder, and that no dividends were therefore due it; that any alleged accrued but unpaid dividends were due to the present owner of the preferred stock, not the plaintiff; and, while admitting the declaration of the dividend on December 28, 1954, denied that any dividend had been declared in 1955, and denied that any dividends were due to the plaintiff as a matter of right (6a).

On January 14, 1957 the district court heard, among other matters in the action, a motion by the defendant for summary judgment or in the alternative judgment on the pleadings on the third count of the amended complaint, and the plaintiff's cross-motion for summary judgment thereon. This is the count which claimed that the defendant was contractually bound by the provisions of its amended certificate of incorporation and its preferred stock certificate to pay a dividend for 1955, net profits being available for the purpose. The district court granted the defendant's motion and denied the plaintiff's cross-motion, the court expressing the view at the argument that, notwithstanding the provision in the certificate of incorporation, a dividend should be payable only when declared in the discretion and judgment of the board of directors (11a).

The order filed February 1, 1957, which embodied the court's disposition with respect to the third count, directed the clerk to enter a final judgment dismissing that count with prejudice, the court expressly determining that there

was no just reason for delay in entering of such final judgment (14a, ¶3). Judgment on the order was entered February 5, 1957 (11a, 2a-3a). This is the ruling here under review.

Also among the matters before the court on January 14, 1957 was a motion by the plaintiff for partial summary judgment on the first count of its amended complaint—*i.e.*, the $5,000 claim for the December, 1954 dividend declared by the defendant and not paid to the plaintiff. This motion was granted as against the defendant. In view, however, of an intervention by one S & C Trading Co., a New York corporation, which claimed that it had acquired the stock from the plaintiff with all rights to dividends thereon, whether declared and unpaid or undeclared (9a), the court directed that the defendant pay the December, 1954 dividend of $5,000 plus interest of $504.16 into the registry of the court, to abide the outcome of the action between the plaintiff and the intervenor (14a, ¶1). Payment of this sum into court was made by the defendant on February 8, 1957 (3a, 10a).

In addition, the defendant moved for partial summary judgment or, in the alternative, judgment on the pleadings, insofar as it was addressed to the second count of the amended complaint—*i.e.*, the claim for dividends allegedly declared in 1955. The motion was denied, discovery by the plaintiff not yet having been completed (14a, ¶2; 10a). The claim asserted in this count, however, was subsequently dismissed by stipulation between the plaintiff and the defendant, which was embodied in an order filed March 7, 1957. The stipulation recited the plaintiff's reliance on an affidavit of the defendant's treasurer, annexed to the stipulation, stating that an examination of the minutes and books of account of the defendant showed that no dividend was declared or paid to the owners of common or preferred stock for the calendar years 1955 (10a).

Notice of appeal was filed on February 14, 1957 from the judgment dismissing the third count of the amended complaint (3a, 15a). In view of the terms of the governing instruments, the district court, we submit, erred in holding the dividend discretionary. As a matter of law, the dividend for 1955 was mandatory, and summary judgment on the claim for the 1955 dividend should have gone for the plaintiff.

ARGUMENT

POINT I

The defendant was contractually required to pay a dividend on its preferred stock for 1955.

The dividend here in issue was clearly contractual in character. As set forth above, the provisions of the defendant's charter and stock certificate provide that the preferred stockholders "shall be entitled to receive," and the defendant "shall be bound to pay thereon"—but only out of its net profits—"a fixed yearly dividend" of 50¢ per share, payable semi-annually. It is true, of course, that ordinarily discretion is vested in the board of directors as to whether dividends shall be declared or withheld. But the language here explicitly makes a fixed yearly dividend binding upon the corporation. It would be difficult to phrase mandatory language more expressly than the defendant did in its governing instruments.

New Jersey law, of course, governs here, since the defendant is a New Jersey corporation and the action arises in the District Court for the District of New Jersey under diversity jurisdiction. It is elementary in New Jersey, as elsewhere, that the statute under which a corporation is organized and its charter comprise a contract defining the rights and obligations of the corporation and its stockholders. *Franzblau* v. *Capital Securities Co.*, 2 N. J. S. 517, 523-4, 64 A. 2d 644 (Ch., 1949); *Pronich* v. *Spirits*

Distributing Co., 58 N. J. Eq. 97, 100, 42 Atl. 586 (1899); 11 Fletcher Cyc. Corp (1932) 53-54. The statutes of New Jersey impose no limitations on a corporation's power to prescribe mandatory dividends if it desires to do so. N.J.S. 14:8-1 authorizes corporations to create two or more classes of stock—

> "* * * with such designations, preferences, relative, participating, optional, or other special rights, qualifications, limitations, or restrictions thereof, as shall be stated and expressed in the certificate of incorporation * * *."

N.J.S. 14:8-2 provides:

> "The holders of preferred * * * stocks shall be entitled to receive dividends at such rates, on such terms, and at such times as shall be provided in the certificate of incorporation, payable in preference to or in such relation to the dividends payable on any other class or classes of stock as shall be so expressed, and such dividends may be made cumulative * * *."

And, under N.J.S. 14:8-20,

> "* * * unless otherwise provided in the certificate of incorporation, or in a by-law * * * the directors of every corporation organized under this title may, in their discretion, from time to time, * * * determine what, if any, dividends shall be declared and paid to stockholders out of its surplus or net profits * * *."

Thus the statute does not require that dividends on preferred stock shall invaribly be subject to the discretion of the directors. On the contrary, it empowers a corporation to issue stock with "such * * * preferences * * * or other special rights" as shall be expressed in the charter. With specific respect to preferred stock, it provides that the holders may receive dividends "on such terms" as the charter may provide. And, finally, the discretion of direc-

tors to determine dividends is made expressly subject to contrary charter or by-law provisions. It is not an absolute discretion.

The language used in the present case should be distinguished from customary preferred provisions which make dividends on the preferred an obligatory prerequisite to the payment of dividends on the common. Thus, for example, Section 18 of the New Jersey Corporation Act of 1896 (L. 1896, c. 185, §18) which, *inter alia*, conferred upon corporations the power to issue preferred stocks, provided that:

> "* * * the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, not exceeding eight per centum, payable quarterly, half-yearly, or yearly, before any dividends shall be set aside or paid on the common stock * * *."

While in this statute, as well as in the corporate charters modelled upon it, the obligation to pay preferred dividends is expressed in mandatory terms, the last clause quoted indicates that it is only the preference over the common that is mandatory, *i.e.*, the corporation is bound to pay a fixed yearly dividend on the preferred "before any dividend shall be set apart or paid on the common * * *." Here, however, under the terms of the charter and stock certificate, it is not the priority of the preferred dividend over the common dividend that is mandatory, but rather the obligation to pay the preferred dividend itself.

While stock calling for a mandatory dividend is not frequently encountered, the cases uniformly uphold the obligation to pay such dividends where their mandatory character is clearly expressed in the governing instrument. The general rule is set forth in 18 C. J. S., §223, pp. 653-4,

> "Corporations may, where expressly authorized by charter or statute, guarantee dividends on preferred stock.

> Even in the absence of express authority, a corporation having power to issue preferred stock and to fix the terms and conditions on which it shall be issued may provide for the payment of a certain rate of interest on stock when earned, regardless of any declaration of dividends by directors * * *."

The issue of whether a provision making dividends mandatory removed the matter from the area confided to directors' discretion was determined in *Park* v. *Grant Locomotive Works,* 40 N. J. Eq. 114, 3 Atl. 162 (Ch. 1885), aff'd 45 N. J. Eq. 244, 19 Atl. 621 (E. & A., 1888), where such a provision was embodied in a contract entered into between all persons interested in a corporation, as creditors or as stockholders, for the purpose of lifting a receivership. The contract provided

> "That all the net profits of the company, after the payment of taxes, insurance, and the necessary amount for the proper maintenance of the property of the company in its present condition and capacity, shall be divided annually among the stockholders." (40 N. J. Eq. 115, 3 Atl. 163)

The stockholders demanded a greater dividend than had been declared. The demand was met by the contention—similar to that advanced by the defendant here and adopted below—that the directors' discretion was controlling. The Vice Chancellor held (40 N. J. Eq. 117-118, 3 Atl. 165):

> "In cases where the power of the directors of a corporation is without limitation, and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. * * * And their determination in respect to these matters, if made in good faith and for honest ends, though the result may

> show that it was injudicious, is final, and not subject to judicial revision. But the directors of this corporation have no such power. The contract takes it from them. The disposition of the net profits is not to be governed by the discretion or judgment of the directors, but by the rule prescribed by the contract. The contract prescribes the standard by which the rights of the stockholders to the profits are to be measured, and the directors, in disposing of them, have no right of judgment, but must perform their contract obligations."

This ruling is directly applicable here, since the provision of the charter, as has been noted, is contractual in character. And relying on the authority of the *Park* case, *Fougeray* v. *Cord*, 50 N. J. Eq. 185, 197, 24 Atl. 499 (Ch. 1892), held:

> "The power of this court to compel a corporation to make a dividend of its profits among its stockholders is well settled."

While the case was reversed on other grounds, *Laurel Springs Land Co.* v. *Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886 (E. & A. 1893), this passage of the opinion was expressly confirmed. 50 N. J. Eq. at 759, 26 Atl. at 887, ¶4.

Other New Jersey cases have also recognized the subordination of discretion in this sphere to the express provisions of the governing corporate instruments. In *Wilson* v. *American Ice Company*, 206 Fed. 736 (D. C. N. J. 1913), plaintiff's demanded dividends out of what they alleged was a sufficiently large surplus. There was no indication that the dividends were other than discretionary, the charter provisions apparently not having been pleaded or put in evidence. The demand was denied. But the court, while upholding the discretionary rights of the directors in this respect, noted that these were controlling

"in the absence of statutory provisions," 206 Fed. at 738. It quoted extensively from *Stevens* v. *U. S. Steel Corp.*, 68 N. J. Eq. 373, 377-8, 59 Atl. 905, 907 (Ch. 1905), where the court said that the directors' discretion was "subject, of course, to provisions in the charter, and also to the by-laws of the company." And N.J.S. 14:8-20, quoted above, expressly subordinates discretion to contrary charter and by-laws provisions.

Where discretionary authority with respect to dividends is conferred by the governing instruments upon the directors, the courts in New Jersey, as elsewhere, interfere only in cases of abuse of discretion. The authorities here cited, we believe, represent all the New Jersey cases arising out of provisions which make dividends mandatory rather than discretionary, or indicating the validity of such provisions. In upholding the binding character of such provisions, New Jersey follows the uniform rule in other jurisdictions that a mandatory dividend provision supersedes the directors' usual discretionary powers.

A leading case in this field is *Wood* v. *Lary*, 54 Hun 550 (Sup. Ct., 1st Dep't., 1888), aff'd, 124 N. Y. 83, 26 N. E. 338 (1889). The court recognized the validity of the usual rule making dividends discretionary. But the usual rule did not govern in that case, because, the court said (54 Hun at 557):

> "* * * The provision of the certificate is that the holder is entitled to dividends whenever in any year the net earnings, after payment of all interest charges, are sufficient for the payment thereof. This places the question of their rights beyond the discretion of the directors and gives the preferred stockholders a right to these profits as dividends, after payment of the interest charges mentioned in the certificate.
>
> "Under these circumstances, whether the directors declared a dividend of these profits arising in each year

> or not, the stockholders were entitled to the same, and perhaps by proper proceedings could have enforced payment of the same at the end of each year. Therefore, the right of the stockholders to these profits became fixed, and even if the directors made no division thereof, the right still existed and could not be taken away."

Another case frequently cited on the subject is *Burk* v. *Ottawa Gas and Electric Co.*, 87 Kan. 6, 123 Pac. 857 (1912). The dividend provision in the charter read as follows (123 Pac. at 858):

> "The preferred stock shall carry a six per cent. per annum preferred noncumulative dividend, payable semi-annually on the first days of July and January of each year after January 1, 1906, out of the net profits, of the preceding fiscal year, and a pro tanto dividend if such dividend falls short of 6 per cent."

The court, construing the provision as calling for dividends out of net profits only, held the dividends to be mandatory. The only superior use of net profits which might defeat the right of the preferred, the court held (one judge dissenting), was the franchise obligation of the corporation to extend its operations for the public benefit, since it was a public utility. The court remanded the case for a determination of whether net profits were available after expenditures for such extensions. It held, however, that if such expenditures did not exhaust the net profits required for the dividends, the corporation was by contract required to pay the dividends.

The *Wood* and *Burk* cases dealt with non-cumulative preferred, but their holding applies to cumulative preferred, as well, which is the type of stock involved here. In *New England Trust Co.* v. *Penobscot Chemical Fiber Co.*, 142 Me. 286, 50 A. 2d 188 (1946), the by-law governing dividends on the preferred stock provided (50 A. 2d at 189):

"Second preferred stock * * * shall be entitled to dividends at the rate of seven per centum per annum and no more, payable quarterly on the first days of August, November, February and May in each year hereafter.

"Such dividends shall be cumulative, so that if on any such quarterly dividend date a dividend of 1¾ per centum of the par value shall not have been paid, the deficiency shall be paid before any dividends shall be declared, paid out, or set apart for any other class of stock, excepting Preferred Stock" (later amended to read "for any class of junior stock").

The corporation contended that dividends rested in the directors' discretion. The court, agreeing with that statements as a general principle, narrowed the question to the following one (50 A. 2d at 190):

"On the facts of this particular case, were these plaintiffs entitled as a matter of right to these dividends, or did the directors have a discretion to withhold them?"

The court held that the customary discretion of the directors with respect to dividends was limited by the terms of "the preferred stock contract" (id.),

"* * * that preferred stockholders under such an agreement are as a matter of right entitled to dividends if they are earned, and that the directors do not have the right to postpone payment of them because in their judgment it is wiser to use the money required for their payment for extensions, rehabilitation and improvement * * *

"We must therefore hold that under the contract between the company and the second preferred stockholders as expressed in the by-law the stockholders were entitled as of right to dividends if they were earned." (50 A. 2d at 191)

Other cases holding that under appropriate provisions dividends are mandatory, rather than discretionary, are:

Crocker v. *Waltham Watch Co.*, 315 Mass. 397, 53 N. E. 2d 230 (1944);
Lydia E. Pinkham Medicine Co. v. *Gove*, 303 Mass. 1, 20 N. E. 2nd 482 (1939);
Warburton v. *John Wanamaker Philadelphia*, 329 Pa. 5, 196 A. 506 (1938); and
Cratty v. *Peoria Law Library Association*, 219 Ill. 516, 76 N. E. 707 (1906).

In *Amick* v. *Coble*, 222 N. C. 484, 23 S. E. 2d 854 (1943), the North Carolina statute provided that directors of a corporation, after periodically—

> "reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand." 23 S. E. 2d at 857.

The court ruled that no valid action had in good faith been taken to fix a working capital. As a result, it was held that the accumulated profits were available for dividends, and that the directors were controlled by the quoted statutory provisions "and have no discretion with respect to the performance of the duty imposed." 23 S. E. 2d at 858.

And in *Wisconsin Lumber Co.* v. *Greene & Western Telephone Co.*, 127 Iowa 350, 101 N. W. 742, 745 (1904) the court said,

> "A corporation may guaranty dividends upon its stock if it is so minded. To hold otherwise would be to set aside many contracts of the kind, which no one heretofore has thought of questioning."

The defendant here has, in effect, also acknowledged that its preferred dividend is of a fixed character. In the declaration of the 1954 dividend by the defendant's directors, the resolution provides for a dividend "at the interest rate of 5%" (5a). It is anomalous to describe an allegedly discretionary dividend as being declared at a given "interest rate". And in *Warburton* v. *John Wanamaker*, *supra*, p. 14, the term "interest", used with respect to a preferred dividend, was held to be evidence, in addition to the terms of the charter and certificate, of the fact that the dividend obligation was fixed and was independent of any discretion by the directors.

It is clear, therefore, that normal directors' discretion must yield in the face of governing language denying such discretion. The language here is of such a character. It provides that the preferred stockholders "shall be entitled to receive", and that the Company "shall be bound to pay" out of net profits a "fixed" annual dividend. The language, drafted by defendant, is explicit and unambiguous. If there are net profits, no room is left for the withholding of a dividend in the directors' discretion. Under its terms the annual dividend is mandatory.

POINT II

The "net profit" limitation is here complied with.

There is one limitation in defendant's charter and stock certificate with respect to the declaration of preferred dividends. This restriction, as noted above, limits the source from which the prescribed dividends are to be paid to defendant's "net profits". N.J.S. 14:8-19 prohibits directors from paying dividends except from surplus "or from the net profits arising from the business of the corporation". Unlike preferred stock provisions occasionally encountered, which make dividends mandatory irrespective of the availability of profits, and which are often not judicially sustained for that reason, 6 A. L. R. 809 *et seq.*

(1920), the limitation in the instruments here confines dividends to net profits and thus accords with the statutory prohibition on the payment of dividends from sources other than surplus and net profits.

It should be noted in this connection that the statute does not limit the source of dividends to net profits for a single year. In construing the expression "net profits" as used in N. J. S. 14:8-19, *Lich* v. *United States Rubber Co.*, 39 F. Supp. 675, 681 (D. C. N. J. 1941), aff'd on opinion, 123 F. 2d 145 (this Court, 1941), held:

> "The term connotes the clear pecuniary gain remaining after deducting from the gross earnings of the business the expenses incurred in its conduct, the losses sustained in its prosecution, and the capital invested * * * It is a prerequisite to the existence of net profits that the assets of a corporation exceed the liabilities, including the liability on the capital stock. Where the capital is impaired, annual net earnings, if insufficient to offset the impairment, do not constitute net profits * * * The term net profits is not synonymous with the term annual net earnings. Annual net earnings may be productive of net profits, or * * * reductive of the deficit * * * "

See also *Mengel Co.* v. *Glenn*, 50 F. Supp. 765, 769 (W. D. Ky., 1943) similarly construing the New Jersey statute.

In the course of discovery proceedings in the present case the plaintiff attempted to ascertain the aggregate of the defendant's "net profits"—the term used both in the statute and the charter—as of December 31, 1954 and 1955, and it served an interrogatory requesting the figures (7a). The defendant replied that "total surplus" on the respective dates was $712,421.30 and $833,923.45, but as to each figure added, "whether earned or contributed is not shown" (id.). Dissatisfied with these equivocal answers, the plaintiff secured an order directing the defend-

ant to reply to the interrogatory by stating the aggregate of its "net profits" (id.). Thus prodded, the defendant gave the self-same figures, now describing them as "earned surplus", a term which it apparently equated with the statutory term "net profits" used in the interrogatories (8a).

On this assumption, which the defendant has not contested, there were ample net profits available during 1955 to pay preferred dividends of $25,000 on the 50,000 share issue of its preferred stock.

Nor did the defendant itself construe the provision in its charter as limiting the source for its dividends to the net earnings for any single year. In 1954 its "net profits earned for the calendar year", to use its language in replying to the interrogatories, were $14,818.80 before taxes (7a). Presumably the figure was even lower after taxes. Yet on December 28, 1954 it declared dividends aggregating $25,000 on its preferred stock. Clearly the defendant accepted the judicial interpretation of the statutory term "net profits" as determining the meaning of the same words in its charter, and did not regard it as referring to net profits earned in the year for which the dividend was declared.

For 1955, the year here in question, the defendant acknowledged its "net profits earned" as amounting to $94,638.59 before taxes (7a), and its earned surplus figure for 1955, given in response to repeated interrogatories requesting its net profits, was $833,923.45 (8a). Since net profits were available in 1955, a direction that the defendant pay the dividend due for that year would thus do no more than require it to comply with its charter obligation, and would conform to the provisions of the statute defining the permissible sources of funds for dividends.

CONCLUSION

No issue of fact was raised below concerning defendant's liability for the 1955 dividend. The case turned solely on a question of law—the interpretation of the provision of the charter and stock certificate—and summary judgment was appropriate. We have shown, however, that in view of the mandatory character of these provisions, leaving no room for directors' discretion, summary judgment should have gone not for the defendant, but for the plaintiff on its cross-motion. Under the circumstances, this Court, in reversing, may now direct that summary judgment be entered in plaintiff's favor. According to 6 Moore, Federal Practice (2d ed., 1953) ¶56.13, p. 2095,

> "* * * In reversing (a grant of summary judgment), does the appellate court have the power to remand with directions to enter summary judgment on appellant's cross-motion?
>
> "* * * The conclusion * * * reached (where the appellant had made no cross-motion for summary judgment) was that the appellate court could do so provided it was very clear that there was no dispute as to the facts which would justify judgment for the appellant. That conclusion is equally pertinent to the case where the appellant had unsuccessfully moved for summary judgment in the trial court. Indeed, it is buttressed by the fact that appellant's motion for summary judgment apprised his adversary, who also had moved for summary judgment, that he should be prepared to meet the appellant's position that on the undisputed facts appellant was entitled to judgment as a matter of law. And remand with directions to enter judgment on appellant's cross-motion for summary judgment will eliminate further delay and expense." (Parenthesized matter added)

And on an agreed statement of facts, such as was here presented,

> "the appellate court reverses an erroneous judgment and remands the cause with direction to enter such judgment as appellant is entitled to." 14 Cyc. Fed. Prac. (3d ed., 1952) §68.89, p. 484.

See also 14 Cyc. Fed. Prac. (3d ed., 1952) §68.85, p. 478; 12 Cyc. Fed. Prac. (2d ed., 1948) §63.10, pp. 482-483.

In the light of the intervention of S & C Trading Co., Inc., with its allegation that the right to dividends passed to it when it acquired the stock formerly held by the plaintiff (9a), the plaintiff, in the event of a reversal here, will consent to the defendant's paying the 1955 dividend into court to abide the outcome of the intervenor's claim. This would be similar to the disposition of the plaintiff's claim to the 1954 dividend under its first count, on which summary judgment against the defendant was granted below, and the money paid into court (9a-10a; 14a, ¶1).

As between plaintiff and defendant, however, the judgment below should be reversed, with a direction that, subject to the condition set forth in the preceding paragraph, summary judgment should be entered against the defendant and in favor of plaintiff.

Respectfully submitted,

KOENIGSBERG and ROSSMOORE,
Attorneys for Arizona Western Insurance Company, Plaintiff-Appellant.

SAMUEL M. KOENIGSBERG,
Of Counsel.

[APPENDIX FOLLOWS]

JOINT APPENDIX

Relevant Docket Entries

7- 5-56—Complaint filed 7-3-56.

* * *

10-15-56—Amended Complaint, and acknowledgment of service, filed 10-11-56.

10-15-56—Answer to amended complaint, filed

11-27-56—Notice of motion by plaintiff for partial summary judgment and for entry of final judgment, and affidavit of service, filed 11-26-56 (ret. 12-10-56) (Brief submitted)

11-27-56—Notice of motion by plaintiff to require answers to interrogatories, and affidavit of service, filed 11-26-56 (No brief submitted)

11-27-56—Deposition of Lowell M. Birrell, filed 11-26-56

12- 7-56—Notice of motion for partial Summary Judgment, or in the alternative, judgment on the pleadings, with acknowledgment of service, filed 12-6-56.

12-10-56—Plaintiff's interrogatories, and answers thereto, filed 12-7-56

12-11-56—Ordered plaintiff's motion to compel more responsive answers, to interrogatories, granted. (Meaney) (12-10-56)

12-13-56—Order directing defendant to compel more responsive answers to certain interrogatories, filed 12-12-56 (Meaney) Notice mailed.

12-26-56—Notice of motion and motion of S. & C. Trading Co., Inc., to intervene, and affidavit of service, filed (ret. 1-14-57) (Brief submitted)

* * *

Relevant Docket Entries

1- 2-57—Notice of motion by plaintiff for entry of summary judgment, and to strike portions of answer, filed 12-31-56 (ret. 1-14-57) (Brief submitted)

* * *

1-11-57—Supplemental Answers to Interrogatories, filed.

1-16-57—Hearing on motion of S. & C. Trading Co., Inc., to intervene. Ordered motion granted. Order submitted. (Meaney) (1-14-57)

1-16-57—Hearing on plaintiff's motion for partial summary judgment and for entry of final judgment. Ordered motion granted. The sum of $5000. to be deposited with the Clerk pending a determination by the Court on the interpleader action. Order to be submitted. (Meaney) (1-14-57)

1-16-57—Hearing on defendant's motion for partial summary judgment, or in the alternative, judgment on the pleadings. Ordered motion denied. Order to be submitted. (Meaney) (1-14-57)

* * *

1-16-57—Hearing on plaintiff's motion for entry of summary judgment on third Count and to strike portions of answer. Ordered motion denied. Order to be submitted. (Meaney) (1-14-57)

1-16-57—Order granting leave of S. & C. Trading Co., Inc. to intervene, and extending time to answer, filed 1-14-57 (Meaney) Notice mailed.

* * *

2- 5-57—Order granting plaintiff's motion for partial summary judgment on Count one of Amended Complaint and for payment into registery; denying plaintiff's motion to strike part of answer to second count of amended complaint, etc.; deny-

ing plaintiff's motion for copy of documents; denying defendant's motion for partial summary judgment as to count two of amended complaint; denying plaintiff's motion for summary judgment as to Count three of amended complaint and granting defendant's motion for partial summary judgment as to count three of amended complaint and dismissing said count, without costs, filed 2-1-57. (Meaney) Notice mailed.

2- 8-57—$5,504.16 deposited in Registry.

* * *

2-21-57—Notice of Appeal filed 2-14-57

* * *

Agreed Statement Pursuant to F.R.C.P. Rule 76

Plaintiff Arizona Western Insurance Company ("Arizona Western" hereafter) is an Arizona corporation. Defendant L. L. Constantin & Co. ("Constantin" hereafter) is a New Jersey corporation. The action, brought in the United States District Court for the District of New Jersey, is based upon diversity of citizenship, the amount in controversy, exclusive of interest and costs, exceeding $3,000.

Arizona Western was the record holder of 10,000 shares of preferred stock of Constantin from on or about October 1, 1954 to on or about February 1, 1956. The certificate of incorporation of Constantin, as amended on or about December 23, 1952, authorized the issuance of 50,000 shares of preferred stock having a par value of $10.00 per share. The certificate of incorporation, as so amended, further provides:

"The holders of the preferred stock shall be entitled to receive, and the Company shall be bound to pay there-

on, but only out of the net profits of the Company, a fixed yearly dividend of fifty cents (50¢) per share, payable semi-annually. The said dividend shall be cumulative. Preferred stockholders shall have no voting rights. The stock shall be redeemable on and after January 2nd, 1955, at Ten Dollars and fifty cents ($10.50) per share."

Arizona Western during the period above stated held Certificate No. P-17 of Constantin's preferred stock, which was of the issue so authorized and which provided as follows:

Number	Shares
P-17	10,000

Incorporated under the laws
of the State of New Jersey

L. L. Constantin & Co.

Authorized issue of 55,000 Shares

50,000 Shares Preferred Stock Par Value $10 Each	5,000 Shares Common Stock Without Par Value

This Certifies that Arizona Western Insurance Company is the owner of Ten Thousand Shares of the Preferred Stock of L. L. Constantin & Co., full paid and non-assessable, transferable only on the books of the Corporation by the holder thereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

The total authorized preferred stock of the corporation will be 50,000 shares having a par value of $10.00 each. The holders of the preferred stock shall be en-

titled to receive, and the Company shall be bound to pay thereon, but only out of the net profits of the Company, a fixed yearly dividend of fifty cents (50¢) per share, payable semi-annually. The said dividend shall be cumulative. Preferred stockholders shall have no voting rights. The stock shall be redeemable on and after January 2nd, 1955 at Ten dollars and fifty cents (10.50) per share.

IN WITNESS WHEREOF, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 1st day of October A. D. 1954.

/s/ MATTHEW A. BERDON
Treasurer

/s/ LOWELL M. BIRRELL
Chairman

On December 28, 1954, at a meeting of the Board of Directors of Constantin, a resolution was duly adopted reading as follows:

"RESOLVED, that a dividend be declared on preferred stock at the interest rate of 5% to all its stockholders of record on December 30, 1954, payable January 15, 1955."

On January 3, 1955 a dividend of $5,000 of the dividends so declared was paid to one Charles Denby, Pittsburgh, Pennsylvania, who held 10,000 shares of preferred stock in Constantin. On March 1, 1955 a dividend of $12,500 of the dividends so declared was paid to Central Standard Insurance Company, Sioux Falls, South Dakota, which held 25,000 shares of preferred stock in Constantin. No payment was made to Arizona Western of the dividends so declared on the 10,000 shares of preferred stock held by it, nor was payment made on the remaining 5,000 shares of the 50,000 issued.

Agreed Statement Pursuant to F.R.C.P. Rule 76

The minute book of Constantin exhibited by Constantin at a deposition herein, contained no minute reflecting the declaration of dividends on the preferred stock for the year 1955.

By its amended complaint in this action, Arizona Western alleged *inter alia* the facts as to its record ownership as above set forth and the non-payment to it by Constantin of a 50¢ per share dividend which it alleged was declared in December 28, 1954, payable January 15, 1955 to stockholders of record December 30, 1954. This was embraced in the first count of the amended complaint. The second count alleged in substance a declaration of a similar dividend and a non-payment thereof in 1955, and the third count alleged in substance that under the terms of Constantin's amended certificate of incorporation and the preferred stock certificate held by Arizona Western, Constantin was bound to pay to Arizona Western, but only out of net profits, a fixed yearly dividend of 50¢ per share, payable semi-annually, and that net profits were available for such dividend. The complaint recited that plaintiff had demanded the dividends and that payment had been refused, and sought a judgment of $5,000 and interest for the unpaid dividend allegedly declared for 1954, and $5,000 and interest for the unpaid dividend which was allegedly either declared by defendant or which defendant was bound to pay for 1955.

The answer recited in substance that plaintiff was no longer a stockholder, that no dividends were therefore due it; that any alleged accrued but unpaid dividends were due to the present owner of the preferred stock, not the plaintiff; and, while admitting the declaration of the dividend on December 28, 1954, denied that any dividend had been declared in 1955, and denied that any 1955 dividends were due plaintiff as a matter of right.

Agreed Statement Pursuant to F.R.C.P. Rule 76

Interrogatories served by Arizona Western on Constantin and the latter's replies thereto include the following:

9. What was the aggregate of defendant's net profits (whether denominated "earned surplus" or otherwise) other than amounts previously paid as dividends,

a) as of December 31, 1954?

Answer: As of December 31, 1954, total surplus was $712,821.30; whether earned or contributed is not shown.

c) As of December 31, 1955?

Answer: As of December 31, 1955, total surplus was $833,923.45; whether earned or contributed is not shown.

10. State the amount of net profits earned by the defendant as shown on its books for each of its fiscal years ending in 1954, 1955, and 1956, and give the date of termination of each such fiscal year.

Answer: Net profits earned for the calendar year 1954 was $14,818.80 before taxes.

Net profits earned for the calendar year 1955 was $94,638.59 before taxes.

By order of December 12, 1956, Constantin was directed to

"Reply to question #9 of the interrogatories by stating the aggregate of defendant's net profits, whether denominated earned surplus or otherwise, other than amounts previously paid as dividends, on the dates specified in said question #9 * * *."

Agreed Statement Pursuant to F.R.C.P. Rule 76

By supplemental answer pursuant to the quoted provision of the above order, as well as another provision thereof, Constantin replied as follows:

"9. a) As of December 31, 1954 the corporation had an earned surplus of $712,821.30.

c) As of December 31, 1955 the earned surplus was $833,923.45.

14. The names of each and every holder of preferred stock of the defendant from January 1, 1954 to July 1, 1956, is as follows:

a) January 1, 1954—Charles Denby, 10,000 shares
Guardian Insurance Company, 40,000 shares

b) On June 30, 1954, Guardian Insurance Company sold 25,000 shares to Central Standard, retaining 15,000 shares.

c) On October 1, 1954, Guardian Insurance Company transferred to Arizona Western Insurance Company 10,000 shares and 5,000 shares to Royal American Insurance Company.

d) On December 31, 1954, Central Standard transferred 20,000 shares to Inland Empire Insurance Company, and 5,000 shares to Royal American Insurance Company.

e) On January 11, 1955, L. L. Constantin & Co. purchased 2,000 shares from Charles Denby.

f) On June 17, 1955, Inland Empire Insurance Company surrendered 20,000 shares of preferred stock, and Royal American Insurance Company surrendered 10,000 shares, and in place thereof 13,000 shares were issued to Inland Empire In-

surance Company, and 17,000 shares to Royal American Insurance Company.

g) On January 31, 1956, Arizona Western Insurance Company sold 10,000 shares to S & C Trading Co. which was transferred on the books of the Company at a subsequent date."

On January 14, 1957 several motions in the action were heard by the court below, including the following:

1. A motion by S & C Trading Co., Inc. to intervene as a plaintiff, based in part upon an affidavit by one Lowell M. Birrell alleging that as a result of his negotiations with the representative of Arizona Western, the transfer by Arizona Western of its 10,000 shares of Constantin preferred stock carried with it all rights to dividends declared and unpaid, or undeclared, and that such dividends were the property of S & C Trading Co., Inc.

2. A motion by plaintiff Arizona Western for partial summary judgment on the first count of its amended complaint—i.e. the $5,000 claim for the 1954 dividend declared by Constantin and not paid to Ariozna Western—and for the entry of final judgment thereon.

3. A motion by Constantin for partial summary judgment or in the alternative judgment on the pleadings on the second and third counts of the amended complaint.

4. A cross-motion by Arizona Western for summary judgment on the third count of the amended complaint.

The disposition of said motions was as follows:

1. The motion of S & C Trading Co. to intervene was granted by order of January 14, 1957.

2. The motion of Arizona Western for partial summary judgment on the first count of the amended complaint—i.e.

its claim for the dividend declared by Constantin on December 28, 1954 but not paid—was granted as against Constantin by order filed February 1, 1957. Defendant Constantin stated that it had no objection to depositing the dividend declared on December 28, 1954 with interest so that the litigation could proceed as between plaintiff and the intervenor as to who was entitled to this fund.

Defendant Constantin further stated that if the plaintiff's theory was correct on the Third Count, the stockholder of record on June 28, 1954 would have been entitled to the semi-annual dividend under plaintiff's theory (dividends were payable semi-annually under the Certificate of Incorporation). Since the plaintiff was not a stockholder on June 28, 1954 the most he could recover on the First Count would be $2500.00 and not the $5000.00 claimed. Plaintiff opposed these contentions. In view of the intervention of S & C Trading Co., with its claim to the said dividend, the court by the said order directed that Constantin pay the December 1954 dividend of $5,000 plus interest of $504.16 into the registry of the court to abide the outcome of the action between Arizona Western and S & C Trading Co. Payment of this sum into court was made by Constantin on February 8, 1957.

3. The motion of Constantin for partial summary judgment or, in the alternative, judgment on the pleadings, insofar as it was addressed to the second count of the amended complaint—i.e., the claim for dividends allegedly declared by Constantin in 1955—was denied, discovery by Arizona Western not having been completed with respect to the cause of action asserted in this count. Pursuant to a subsequent stipulation of dismissal between Arizona Western and Constantin, however, which was embodied in an order filed March 7, 1957, the action between them on the second count was dismissed, the stipulation reciting

Agreed Statement Pursuant to F.R.C.P. Rule 76

Arizona Western's reliance on an affidavit of the treasurer of Constantin, dated January 16, 1957, and annexed to the stipulation, stating that an examination of the minutes and books of account of Constantin showed that no dividend was declared or paid to the owners of common or preferred stock for the calendar year 1955.

4. The motion of Constantin for summary judgment or, in the alternative, judgment on the pleadings, insofar as it was addressed to the third count of the amended complaint—i.e., the count which claimed that Constantin was contractually bound by the provisions of its amended certificate of incorporation and its preferred stock certificate to pay a dividend for 1955, net profits being available therefor—was granted and Arizona Western's cross-motion for summary judgment addressed to the said third count was denied, the court expressing the view at the argument on these motions that, notwithstanding the provision in the certificate of incorporation, a dividend should be payable only when declared in the discretion and judgment of the Board of Directors. The order filed February 1, 1957, which made this disposition with respect to the third count, directed the clerk to enter a final judgment dismissing the third count with prejudice, the court expressly determining that there was no just reason for delay in the entering of such final judgment. Judgment on the order was entered February 5, 1957.

Notice of appeal was filed on February 14, 1957 from the judgment dismissing the third count of the amended complaint.

Annexed hereto and made part hereof, pursuant to F. R. C. P. Rule 76, are:

1. A copy of the judgment appealed from,

2. A copy of the notice of appeal, the filing date of which is February 14, 1957.

Agreed Statement Pursuant to F.R.C.P. Rule 76

The points to be relied on by the plaintiff-appellant are the following:

"1. Where the certificate of incorporation and preferred stock certificate of the defendant-appellee provided that:

'The holders of the preferred stock shall be entitled to receive, and the Company shall be bound to pay thereon, but only out of the net profits of the Company, a fixed yearly dividend of Fifty Cents (50¢) per share, payable semi-annually.'

and plaintiff-appellant was the holder of such preferred stock certificate during an entire year, and net profits were amply available, the court erred in holding that the defendant appellee was not bound to pay to plaintiff-appellant the fixed yearly dividend so provided.

"2. Where a count in the amended complaint demanded payment of the dividend so provided for, and there was no issue of fact, the court erred in denying plaintiff-appellant's motion for summary judgment on said count, and in granting defendant-appellee's motion for summary judgment or in the alternative for judgment on the pleadings on said count."

KOENIGSBERG AND ROSSMOORE
Attorneys for Plaintiff-Appellant
By: SAMUEL M. KOENIGSBERG
A Member of the Firm

GREENBURG, WILENSKY AND FEINBERG
Attorneys for Defendant-Appellee
By: BERNARD FEINBERG

Approved
April 1, 1957
THOMAS F. MEANEY

U. S. D. J.

Order

(Filed—February 1, 1957)

This matter coming before the Court in the presence of Koenigsberg and Rossmoore, Esqs. (by Samuel M. Koenigsberg, Esq.), attorneys for plaintiff, and Greenburg, Wilensky & Feinberg, Esqs. (by Bernard Feinberg, Esq.), attorneys for defendant, and Budd, Larner & Kent, Esqs. (by Samuel A. Larner, Esq.), attorneys for the intervenor, on the following motions:

A. Motion of plaintiff for partial summary judgment, and for entry of final judgment thereon, addressed to the First Count of the Amended Complaint herein;

B. Motion of defendant for partial summary judgment, or in the alternative, judgment on the pleadings, addressed to the Second and Third Counts of the Amended Complaint and the Answer thereto;

C. Cross-Motion of plaintiff for summary judgment addressed to the Third Count of the Amended Complaint;

D. Motion of plaintiff to strike part of defendant's answer, addressed to the Answer to the Second Count of the Amended Complaint; and

E. Motion of plaintiff for copying of documents;

and the Court having, on January 14, 1957, granted the motion of S & C Trading Co., Inc., to intervene herein as a plaintiff, none of the parties objecting thereto; and plaintiff Arizona Western Insurance Company having, in the light of said intervention, withdrawn its application for the entry of final judgment on its motion for partial summary judgment ("A" above); and the Court having considered the several matters,

It is on the 31st day of January, 1957, ORDERED as follows:

Order

1. Partial summary judgment is granted against defendant on the First Count of the Amended Complaint ("A" above); defendant, within ten (10) days of the date of service hereof, shall pay into the registry of the Court the sum of $5,000, together with interest at 6% from May 10, 1955 to January 15, 1957 in the amount of $504.16, or a total of $5,504.16, said amount to remain in the registry of the Court to abide the outcome of the action herein between plaintiff Arizona Western Insurance Company and intervenor S & C Trading Co., Inc.;

2. The motion of defendant for partial summary judgment, or in the alternative, judgment on the pleadings ("B" above) insofar as it is addressed to the Second Count of the Amended Complaint and the Answer thereto, is denied;

3. The motion of defendant for partial summary judgment or, in the alternative, for judgment on the pleadings ("B" above), insofar as it is addressed to the Third Count of the Amended Complaint and the Answer thereto, is granted, and plaintiff's cross-motion for summary judgment addressed to said Count ("C" above) is denied; and the Clerk of this Court is hereby directed to enter a final judgment upon Paragraph 3 of this Order in favor of the defendant and against the plaintiff, dismissing the Third Count of the Amended Complaint with prejudice but without costs, the Court expressly determining that there is no just reason for delay in the entering of such final judgment;

4. The motion of plaintiff to strike part of defendant's Answer ("D" above) is denied; defendant shall, within ten (10) days of the date of service hereof furnish to plaintiff the addresses of the preferred stockholders named in Paragraph 14 of the Supplemental Answers to Interrogatories herein (except for Charles Denby and Central Standard Insurance Company, previously furnished);

Notice of Appeal

5. The motion of plaintiff for copy of documents ("E" above) is denied; and

6. Neither party shall be allowed costs as against the other on these motions.

THOMAS F. MEANEY, *U. S. D. J.*

We hereby consent to the above order as to form only.

KOENIGSBERG AND ROSSMOORE,
Attorneys for Plaintiff,
By SAMUEL M. KOENIGSBERG,
A Member of the Firm.

GREENBURG, WILENSKY & FEINBERG,
Attorneys for Defendant,
By BERNARD FEINBERG,
A Member of the Firm.

BUDD, LARNER & KENT,
Attorneys for Intervenor,
By SAMUEL A. LARNER,
A Member of the Firm.

Notice of Appeal

(Filed—February 14, 1957)

PLEASE TAKE NOTICE that plaintiff Arizona Western Insurance Company hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered herein February 5, 1957, dismissing the Third Count of the plaintiff's Amended Complaint herein.

Dated: February 13, 1957.

KOENIGSBERG AND ROSSMOORE,
Attorneys for Plaintiff
Arizona Western Insurance Co.,
By SAMUEL M. KOENIGSBERG,
A Member of the Firm.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 575

L. L. CONSTANTIN & CO.,
Petitioner,

vs.

ARIZONA WESTERN INSURANCE COMPANY,
Respondent,

S & C TRADING CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MYRON S. LEHMAN,
Attorney for and Counsel of Petitioner,
1180 Raymond Boulevard,
Newark 2, New Jersey.

WILLIAM A. CONSODINE,
Of Counsel with Petitioner,
744 Broad Street,
Newark 2, New Jersey.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

L. L. CONSTANTIN & Co.,

Petitioner,

vs.

ARIZONA WESTERN INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, L. L. Constantin & Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 31, 1957.

Citations to Opinions Below.

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto *infra*, p. 10, has not been officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented.

Whether in the absence of bad faith and abuse of discretion, the judiciary should exercise its power purely on contract construction to declare dividends as opposed to the sound judgment of corporate management by action of its Board of Directors.

Statutes Involved.

The statutory provisions involved are N. J. S. 14:8-1 and N. J. S. 14:8-20. They are printed in Appendix A, *infra*, p. 9.

Statement.

L. L. Constantin & Co., a New Jersey corporation, (Constantin) was incorporated July 1, 1947. It is engaged in the engineering and manufacture of electronic components such as transistors, terminals and connector plugs, all of fine precision. From a small family held corporation it has grown to be one of the leaders in its field, by reinvesting its earnings to expand its plant facilities and increase general and new production.

On or about December 23, 1952, Constantin amended its certificate of incorporation. The amendment provided in part that:

> "The holders of the preferred stock shall be entitled to receive, and the company shall be bound to pay thereon, but only out of net profits of the company, a fixed yearly dividend of Fifty Cents (50¢) per share, payable semi-annually."

An identical provision appeared on the preferred stock certificates. Arizona Western Insurance Company, an Arizona Corporation, (Arizona) became the record holder of 10,000 shares of said stock on or about October 1, 1954.

Constantin's Board of Directors on December 28, 1954, adopted a resolution which read:

> "Resolved, that a dividend be declared on preferred stock at the interest rate of 5% to all stockholders of record on December 30, 1954, payable January 15, 1955."

In 1954 no dividends were paid on the shares held by Arizona. Arizona made a demand on Constantin for dividends and upon the refusal of Constantin instituted a suit in the United States District Court for the District of New Jersey on the basis of diversity.

The first count of Arizona's complaint related to the non-payment of the dividend declared on December 28, 1954. The second count alleged a declaration of a dividend and a non-payment thereof in 1955. The third count asserted that due to the amendment to the certificate of incorporation in December 1952, Constantin was bound to pay to Arizona out of net profits a fixed yearly dividend of 50¢ per share.

Constantin answered that in view of the fact that Arizona was no longer a stockholder, no dividends were due it but rather any alleged dividends were due the present owners of the stock. Constantin denied that any declaration of dividend had been declared in 1955 and denied also that any dividends were due in 1955 as a matter of right.

The S & C Trading Co., Inc., being the purchaser of the 10,000 shares of preferred stock on was allowed to intervene.

The District Court granted Arizona's motion on the first count and ordered Constantin to pay the declared December 1954 dividends of $5,000 plus $504.16 interest into court pending the outcome of the action between Arizona and S & C Trading Co.

The second count was dismissed, pursuant to a stipulation between Arizona and Constantin.

Constantin made a motion for summary judgment with respect to the third count, which was granted. The District Court did not hand down a decision, but on the oral argument related to the motions the court expressed its position that "notwithstanding the provision in the certificate of incorporation a dividend should be payable only when declared in the discretion and judgment of the Board of Directors." (Appendix B, *infra*, p. 13).

The court below applied the law of New Jersey to determine the issue (*Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)), and reversed the District Court upon the authority of *Park* v. *Grant Locomotive Works*, 40 N. J. Eq. 114, 3 A. 162 (Ch. 1885); *Fourgeray* v. *Cord*, 50 N. J. Eq. 185, 24 Atl. 499 (Ch. 1892); *Stevens* v. *United States Steel Corp.*, 68 N. J. Eq. 373, 59 A. 905 (Ch. 1905); N. J. S. 14:8-20 (Appendix A hereto, *infra*, p. 9) and N. J. S. 14:8-1 (Appendix A hereto, *infra*, p. 9).

Reasons for Granting the Writ.

1. The court below in adjudicating an issue never before directly decided in the State of New Jersey rendered a decision which is in conflict with the law of that State, the prevailing law in the majority of jurisdictions and the decisions of this Court. In the absence of bad faith and abuse of discretion it has been consistently held that the judiciary will not interfere with corporate management or construe contracts so as to deprive directors of the power to preserve the Corporation entrusted to its control. *New York Lake Erie & Western Railroad Company* v. *Tom Nickals et al.*, 119 U. S. 296, 7 S. Ct. 209 (1896); *Wabash Railway Company* v. *Barclay*, 280 U. S. 197, 50 S. Ct. 106, (1930); *Gibbons* v. *Mahon*, 136 U. S. 549, 10 S. Ct. 1057 (1889); *Agnew* v. *American Ice Co.*, 2 N. J. 291, 66 A. 2d 330 (1949); *Auburn* v. *Button Works Inc.* v. *Perryman Electrical Co. Inc.*, 107 N. J. Eq. 554, 154 A. 1 (1931); *Madsen* v. *Burns Brothers*, 108 N. J. Eq. 275, 155 Atl. 28 (1931); *In re Evening Journal Association, Inc. etc.*, 15 N. J. Super. 58, 83 A. 2d 138 (1951); *Lich* v. *U. S. Rubber Co.*, 39 Fed. Supp. 675 (D. C. N. J. 1941); *Guttman* v. *Illinois Central Railroad Co.*, 91 Fed. Supp. 285 (U. S. D. C., E. D. N. Y. 1950); *Wilson* v. *American Ice Company*, 206 F. 736 (D. C. N. J. 1913); 11 Fletcher, Corporations, Sec. 5325 (1932 Edition); 18 C. J. S., Corporations, § 466; 67 A. L. R. 762.

It should be noted that at no time has there been an allegation of bad faith or abuse of discretion, which the leading cases make the necessary ingredient to compel a declaration of dividends. See, *Wilson* v. *American Ice Co.*, 206 F. 736 at page 742, "clear and unambiguous

allegation showing willful neglect or bad faith" is required; *Gibbons* v. *Mahon,* 136 U. S. 549 at page 558, "unless in a case of fraud or bad faith on their part (directors) their discretion in this respect cannot be controlled by the courts." *Guttman* v. *Illinois Central Railroad Co.,* 91 Fed. Supp. 285 (U. S. D. C., E. D. N. Y. 1950); *Stevens* v. *U. S. Steel Corp.,* 68 N. J. Eq. 373, 390, 59 A. at page 912; 18 C. J. S., Corporations, Sec. 466; 11 Fletcher, Corporations, Sec. 5325, pp. 801-802 (1932 Ed.). The court below ignored the required allegation and ruled contrary to the prevailing principle enunciated in *Lich* v. *U. S. Rubber Company,* 39 Fed. Supp. 675 (D. C. N. J. 1941).

> "The directors are charged with the management of the corporate business, and, in the absence of fraud or bad faith, their authority must be regarded as absolute. Questions of management and policy must be left to their honest judgment and discretion. *Kelly* v. *Kelly-Springfield Tire Co.,* 106 N. J. Eq. 545, 554, 152 A. 166; *Elevator Supplies Co.* v. *Wylde,* 106 N. J. Eq. 163, 150 A. 347; *Shonnard* v. *Elevator Supplies Co., Inc.,* 111 N. J. Eq. 94, 161 A. 684, 39 Fed. Supp. at page 683."

2. Clearly the question presented is of the utmost importance for the preservation of the discretion required in corporate management and the position of the judiciary to refrain from exercising control over corporate affairs. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost every case wherein a profit is made by a corporation and a dividend is not declared. In allowing the lower court's decision to remain undisturbed, corporate provisions either similar or dissimilar to those used in the instant case will subject corporate management to coercion by threat of suit, healthy and normal growth of industry will be im-

paired and the investment of stockholders will not receive the proper protection afforded by sound corporate management.

3. The decision of the lower court is believed to be erroneous since it is contrary to the law of New Jersey. *In re Evening Journal Association,* 15 N. J. Super. 58, 71, 83 A. 2d 138 (Ch. Div. 1951). Moreover, the decision below conflicts with the applicable decisions of this Court. *New York Lake Erie & Western Railroad Company* v. *Tom Nickals,* 119 U. S. 296, 304, 7 S. Ct. 209 (1886). Irrespective of the weight of authority the lower court reversed the District Court relying upon the authority of *Park* v. *Grant Locomotive Works,* 40 N. J. Eq. 114, 3 A. 162 (Ch. 1885). The court in effect construed the provision in the certificate of incorporation to be mandatory rather than directory. It is agreed that the construction was valid in *Park* v. *Grant Locomotive Works, supra,* since the accepted rules of construction look to the object sought to be reached by the parties to the contract or the conduct of the parties in relation to the subject matter. 57 C. J. 548; 17 C. J. S., Contracts, Sec. 328; 3 Williston, Contracts, Sec. 617 (1936 Edition). In that case there was a specific contract to convey the stock of an insolvent corporation to secured and unsecured creditors of the corporation and there was to be a gradual payment of the corporate indebtedness to the creditors. The instant case has neither the circumstances nor the conduct of the parties to substantiate the lower court's mandatory interpretation of the provisions in issue. In looking to other jurisdictions as to the general law on the subject of mandatory provisions the lower court placed reliance on *Crocker* v. *Waltham Watch Co.,* 315 Mass. 397, 53 N. E. 2d 230 (1944) (Appendix B, *infra,* note 13, p. 16), a holding

which has been severely criticized as being erroneous. 39 Ill. L. Rev. 90.

> "The courts holding goes far in interfering with the discretionary power of corporate management. The decision predicated upon contract construction, makes possible the substitution of court judgment, as to policy expediency, for that of the directors. The advisability of using this means to extend judicial control where the question of bad faith is not in issue does not meet with approval of the majority of courts." (p. 94).

Further, the lower courts decision is contrary to the well settled principle that a preferred stockholder cannot be a creditor of a corporation as to dividend in the absence of permissive statutory authority. *Field* v. *Lamson & Goodenow Manufacturing Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136 (Sup. Jud. Ct. Mass., 1899); 6 A. L. R. 809 et seq.; *Collins* v. *Portland Electric & Power Co.*, 12 F. 2d 671 (C. C. A. IX, 1926).

The net result of the decision below is to change by adjudication an inherent part of corporation's equity capital into funded debt. It changes the status of preferred stockholders from owners to ereditors. Paradoxically a corporation may not claim such dividends as a part of its operating expense for tax purposes.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MYRON S. LEHMAN,
Attorney for Petitioner.

WILLIAM A. CONSODINE,
Attorney for Petitioner.

Appendix A.

N. J. S. 14:8-1.

Every corporation organized under this title may create two or more classes of stock, any of which may be stock with par value or stock without nominal or par value, with full, limited or no voting powers, of such classes, with such designations, preferences, relative, participating, optional or other special rights, qualifications, limitations, or restrictions thereof, as shall be stated and expressed in the certificate of incorporation, but no stock with par value shall be created entitling the holders thereof to receive preferred dividends thereon in excess of eight per cent per annum.

The power to increase, decrease or otherwise adjust the capital stock as in this title elsewhere provided shall apply to all or any of the classes of stock.

No corporation shall have the power to issue any stock with par value at less than the par value thereof.

N. J. S. 14:8-20.

Unless otherwise provided in the certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation organized under this title may, in their discretion, from time to time, fix and vary the amount of the working capital of the corporation and determine what, if any, dividends shall be declared and paid to stockholders out of its surplus or net profits. Dividends may be declared and paid in capital stock with or without par value.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,195

ARIZONA WESTERN INSURANCE COMPANY,
Appellant,

v.

L. L. CONSTANTIN & Co.

and

S & C TRADING Co., INC., a corporation (intervenor)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 6, 1957

Before BIGGS, *Chief Judge,* and GOODRICH and KALODNER, *Circuit Judges.*

Opinion of the Court.

(Filed July 31, 1957)

By BIGGS, *Chief Judge.*

Arizona Western Insurance Company (Arizona) instituted this suit against L. L. Constantin & Co. (Constantin) to recover dividends on 10,000 shares of preferred stock in Constantin held by Arizona and authorized by the December 2, 1952 amendment to Constantin's certificate of incorporation.[1] This provided in pertinent part that "The holders of the preferred stock shall be entitled to receive, and the Company shall be bound to pay thereon, but only out of the net profits of the Company, a fixed yearly dividend of Fifty Cents (50¢) per share, payable semi-annually." An identical provision appeared in the preferred stock certificate. Arizona was the record holder of the stock from on or about October 1, 1954 to on or about February 1, 1956.[2]

Constantin's Board of Directors on December 28, 1954 adopted a resolution which read: "Resolved, that a dividend be declared on preferred stock at the interest rate of 5% to all * * * stockholders of record on December 30, 1954, payable January 15, 1955."[3] At the declared rate Arizona as the holder of 10,000 shares of preferred stock was entitled to dividends of $5,000. Constantin paid dividends on certain shares of its preferred stock but nothing was paid on the shares held by Arizona.

In 1955 no dividend was paid to any holder of preferred stock.

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[1] The amendment authorized the issuance of 50,000 shares of preferred stock having a par value of $10.00 per share.

[2] Stipulated pursuant to Fed. R. Civ. P. 76.

[3] The declared rate of 5% was equivalent to the 50¢ per share provided in the charter and stock certificate.

After a demand for dividends Arizona instituted suit on the basis of diversity.[4] The first count of the amended complaint related to the non-payment of the dividend declared on December 28, 1954. The second count alleged a declaration of a dividend and non-payment thereof in 1955. The third count alleged that under the terms of Constantin's amended certificate of incorporation and the preferred stock certificate, Constantin was bound to pay to Arizona out of net profits a fixed yearly dividend of 50¢ per share, payable semi-annually, and that net profits were available for the payment of such a dividend. Arizona alleged that it demanded payments of the dividends, that payment was refused and that it is entitled to a judgment in the amount of $5,000 plus interest for the dividend declared in 1954 and not paid to Arizona and to a judgment in the amount of $5,000 plus interest for the unpaid dividend which, it is alleged, Constantin was bound to pay in 1955, there being net profits available.

Constantin answered in substance that Arizona was no longer a stockholder and that therefore no dividends were due it; that any alleged accrued but unpaid dividends were due to the present owner of the preferred stock, not Arizona; and, while admitting the declaration of a dividend on December 28, 1954, Constantin denied that any dividend had been declared in 1955, and denied also that any dividends were due in 1955 as a matter of right.

S & C Trading Co., Inc., was permitted to intervene as a party plaintiff on the basis of a contention that as transferee of 10,000 shares of the preferred stock held by Arizona, it was entitled to all dividends and rights to dividends declared and unpaid, or undeclared.[5]

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[4] Arizona is an Arizona corporation and Constantin is a New Jersey corporation.

[5] From answers to interrogatories and from facts set out in the agreed statement, it appears that Arizona sold its 10,000 shares to S & C Trading Co. on January 31, 1956, and that S & C Trading Co. became record holder of the stock on or about February 1, 1956.

Arizona moved for partial summary judgment on the first count of the amended complaint and this motion was granted. In view of the intervention and claim to dividends by S & C Trading Co., the court below ordered Constantin to pay the December 1954 dividend of $5,000 plus $504.16 interest into the registry of the court to await the outcome of the action between Arizona and S & C Trading Co.

Pursuant to a stipulation between Arizona and Constantin, the action based on the second count was dismissed. An examination of the minutes and books of account of Constantin showed that no dividend was declared or paid to the owners of preferred stock for the calendar year of 1955.

Constantin's motion for summary judgment, or judgment on the pleadings in the alternative, with respect to the third count of the amended complaint, was granted, and Arizona's cross-motion for summary judgment addressed to the third count was denied. The court below handed down no opinion explaining the reasons which caused it to take the action it did on the motions directed to the third count but on the occasion of oral argument on the motions the court expressed the view that "notwithstanding the provision in the certificate of incorporation, a dividend should be payable only when declared in the discretion and judgment of the Board of Directors."[6] The clerk was directed to enter a final judgment dismissing the third count with prejudice, the court below expressly determining that there was no just reason for delay in the entering of such a judgment. Rule 54(b), Fed. R. Civ., P., 28 U. S. C.

This appeal relates only to the lower court's determination as to the third count of the amended complaint. As we have indicated this count alleged that Constantin was contractually bound by the provisions of its amended certi-

[6] Stipulated pursuant to Fed. R. Civ. P. 76.

ficate to pay a dividend for 1955, net profits being available.[7]

Constantin contends that if this court compels the payment of a dividend, absent fraud or bad faith on the part of the Board of Directors, it will be interfering in the management and internal affairs of the corporation; that the compelling of a payment of a dividend would change the status of Arizona from a shareholder to a creditor; and that a suit to compel a declaration of a dividend is a class action and Arizona does not allege that it sues on behalf of other stockholders similarly situated.

Since Arizona's claim is asserted against Constantin, a New Jersey corporation, and is based on the certificate of incorporation granted that corporation under the corporation law of that State, the law of New Jersey must determine the issues before us. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Does the law of New Jersey support the conclusion that the provisions of the amended certificate of incorporation and the preferred stock certificate contractually bind Constantin to pay a dividend for 1955, net profits being available for the purpose? We conclude that it does.

The few New Jersey cases relevant to the issue are not too helpful. In *Park* v. *Grant Locomotive Works*, 40 N. J. Eq. 114, 117-18, 3 Atl. 162, 165 (Chancery 1885), the court employed strong language to point out that the discretion of the directors in the disposition of net profits was limited by the contract entered into between the stockholders and creditors to lift a receivership and to enable the insolvent corporation to resume its business. Payment was

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[7] Arizona, in the event of reversal by this court, agrees that Constantin should pay the 1955 dividend into court to abide the outcome of the claim by S & C Trading Co. This would be similar to the disposition already made of Arizona's claim to the 1954 dividend under the first count of its amended complaint.

ordered. In the cited case the complainants, seeking payment of the larger dividend, were stockholders who had been creditors. In truth, the obligations sued on possessed some of the characteristics of a debt as well as of a stock. The decision of the Court of Chancery was affirmed *per curiam* by the Court of Errors and Appeals in 45 N. J. Eq. 244, 19 Atl. 621 (1888).

In *Fougeray* v. *Cord*, 50 N. J. Eq. 185, 24 Atl. 499 (Chancery 1892), the court recognized its power to compel a corporation to pay a dividend from profits but indicated it would not have ordered such a step had not the managers of the corporation perpetrated a fraud on the complainant. The decree of the Vice-Chancellor was reversed, *sub nom. Laurel Springs Land Co.* v. *Fougeray,* 50 N. J. Eq. 756, 26 Atl. 886 (1893), but the Court of Errors and Appeals recognized the power of the Court of Chancery to order the directors of a trading corporation to pay a dividend from profits when they refused to do so without justification.

The language employed by the Court of Chancery in *Stevens* v. *United States Steel Corp.,* 68 N. J. Eq. 373, 377-78, 59 Atl. 905, 907 is pertinent. The Vice-Chancellor said: "Subject of course, to provisions in the charter, and also to the by-laws of the company, it is for the directors to say whether profits shall be distributed to the stockholders, or retained for the purpose of the corporate business." In *Wilson* v. *American Ice Co.,* 206 Fed. 736, 738 (1913), the United States District Court for the District of New Jersey stated, "It is well settled, that in the absence of statutory provisions, the granting of dividends from the profits of a trading corporation is in the discretion of the directors, subject to the intervention of a court of equity for improper refusal."

The decisions referred to are the only New Jersey cases relevant to the issue before us which our research and the diligence of counsel have uncovered. Nonetheless,

it is our duty where "the State law supplied the rule of decision to ascertain and apply that law 'even though it has not been expounded by the highest court of the State.' Fidelity Union Trust Co. *v.* Field, 311 U. S. 169, 177-78 (1940)." *Brown* v. *Moore*, F. 2d , (3 Cir. 1957).

We appreciate the reluctance of courts to construe provisions relative to the declaration of dividends in such a way as to hold that the directors are bound in certain circumstances to declare dividends. But the shareholder has the right to have his contract enforced, and, if the contract as expressed in the certificate of incorporation and the stock certificate, require the construction that dividends are mandatory under specified circumstances the courts can adopt no other construction of the contract between the corporation and the stockholder. See *Crocker* v. *Waltham Watch Co.*, 315 Mass. 397, 53 N. E. 2d 230 (1944).

The amended certificate of incorporation in the case at bar provides in pertinent part that, "The holders of the preferred stock *shall be entitled to receive*, and the Company *shall be found to pay* thereon, but only out of the net profits of the Company, a fixed yearly dividend of fifty cents (50¢) per share, payable semi-annually."[8] Identical language is found in the preferred stock certificate.[9] Words could not more clearly or plainly manifest that Constantin agreed to be bound to pay dividends where net profits were available for the purpose. We will not hold that the words were employed as a bait to prospective purchasers of preferred stock.

The statutes of New Jersey do not preclude a corporation from setting provisions in its charter providing for the

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[8] Italics added.

[9] The pertinent part of the amended certificate of incorporation, and the preferred stock certificate are set out in the agreed statement filed pursuant to Fed. R. Civ. P. 76.

mandatory payment of dividends.[10] New Jersey Statutes Annotated 14:8-20 states that, "*Unless otherwise provided in the certificate of incorporation,* or in a by-law * * * the directors of every corporation organized under this title may, in their discretion, from time to time * * * determine what, if any, dividends shall be declared and paid to stockholders out of its surplus or net profits * * *"[11] The language we have italicized shows that the discretion ordinarily possessed by the directors in respect to the declaration of dividends may legally be contracted away under the law of New Jersey.

The explicit language of Constantin's amended certificate of incorporation and of its preferred stock certificates and the provisions of the New Jersey statutes themselves cause us to conclude that the Supreme Court of New Jersey, did that tribunal have the instant case before it, would hold that the payment of a dividend for the year 1955 was required of Constantin if there were net profits available. This conclusion is not incongruous in the light of the general law.[12] Dealing with mandatory dividends, and is supported by the decisions of strong courts of other States.[13]

The only question that remains is whether Constantin had net profits for the year 1955 out of which dividends

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[10] N. J. S. 14:8-1 authorizes a corporation to create two or more classes of stock with such "designations, preferences * * * or other special rights" as expressed in the certificate of incorporation.
N. J. S. 14:8-2 provides in part that, "The holders of preferred or special stocks shall be entitled to receive dividends at such rates, on such terms, and at such times as shall be provided in the certificate of incorporation * * *"

[11] Italics added.

[12] 12 Fletcher, Cyc. Corp., § 5447.1 (1957 Revision); 18 C. J. S., Corporations § 223; 13 Am. Jur., Corporations § 696; Annotation, 27 A. L. R. 1073, 1089-92.

[13] New England Trust Co. v. Penobscot Chemical Fiber Co., 142 Me. 286, 50 A. 2d 188 (1946); Crocker v. Waltham Watch Co., 315 Mass. 397, 53 N. E. 2d 230 (1944); Lydia E. Pinkham Medicine Co. v. Gove, 303 Mass. 1, 20 N. E. 2d 482 (1939); Warburton v. John Wanamaker Philadelphia, 329 Pa. 5, 196 Atl. 506 (1938); Burk v. Ottawa Gas & Elec. Co., 87 Kan. 6, 123 Pac. 857 (1912); Cratty v. Peoria Law Library Assn., 219 Ill. 516, 76 N. E. 707 (1906); Wisconsin Lumber Co. v. Green & Western Telephone Co., 127 Iowa 350, 101 N. W. 742, 745 (1904); Wood v. Lacy, 54 Hun 550 (Sup. Ct. 1st Dept. 1888), aff'd 124 N. Y. 83, 26 N. E. 338 (1891).

could have been paid.[14] Arizona served interrogatories on Constantin requesting the latter to reveal the aggregate of its "net profits (whether denominated 'earned surplus' or otherwise)" as of December 31, 1954 and 1955. Constantin replied that "total surplus" on the respective dates was $712,821.30 and $833,923.45, but added "whether earned or contributed is not shown." Arizona thereupon obtained an order directing Constantin to "Reply to * * * the interrogatories by stating the aggregate of defendant's net profits, whether denominated earned surplus or otherwise * * *" Pursuant to the order Constantin gave the same figures and described them as "earned surplus." It would appear that Constantin was attempting to evade a straightforward answer to Arizona's interrogatory, an evasion which the court below should not have tolerated. A corporation is no more entitled to avoid the discovery processes of a United States district court than is an individual. Corporate officers must be compelled to answer proper questions and if they refuse to respond to the proper orders of the court appropriate legal process should be applied to them. At the argument before us counsel for Constantin wisely abandoned the quibble and conceded in open court that "net profits" were available.

The order of the court below granting summary judgment to Constantin will be reversed. The case will be remanded with the direction to enter judgment in favor of Arizona in such amount as the facts and the law shall require.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[14] The amended certificate of incorporation and the preferred stock certificate require payment only out of "net profits." This is in conformity with N. J. S. 14:8-19 which prohibits directors from paying dividends except from surplus "or from the net profits arising from the business of the corporation." The expression "net profits" as used in the statute has been construed not to be synonymous with annual net earnings but to be the "clear pecuniary gain remaining after deducting from the gross earnings of the business the expenses incurred in its conduct, the losses sustained in its prosecution, and the capital invested." Lich v. United States Rubber Co., 39 F. Supp. 675, 681 (D. N. J. 1941), aff'd on opinion of district court, 123 F. 2d 145 (3 Cir. 1941). See also Mengel Co. v. Glen, 50 F. Supp. 765, 769 (W. D. Ky. 1943).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 575

L. L. CONSTANTIN & CO.,
Petitioner,

vs.

ARIZONA WESTERN INSURANCE COMPANY,
Respondent,

and

S. & C. TRADING CO., INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT ARIZONA WESTERN INSURANCE COMPANY IN OPPOSITION

WILLIAM ROSSMOORE,
Attorney for Respondent Arizona Western Insurance Company,
60 Park Place,
Newark 2, New Jersey.

SAMUEL M. KOENIGSBERG,
Of Counsel.

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BRIEF FOR RESPONDENT ARIZONA WESTERN INSURANCE COMPANY IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals is reported at 247 F. 2d 388.

Counter-Statement of the Question Presented

Did not the court below correctly interpret a corporate charter in the light of New Jersey law when it held that a charter providing that a corporation is "bound to pay * * * out of net profits * * * a fixed yearly dividend," in a

stated sum, supersedes the discretion normally reserved for directors in the declaration of dividends, and instead makes a dividend out of net profits mandatory?

Counter-Statement

An amendment to the charter of petitioner (sometimes referred to as "Constantin" hereafter), a New Jersey corporation, which authorized the issuance of its preferred stock, provided:

> "The holders of the preferred stock shall be entitled to receive, and the company shall be bound to pay thereon, but only out of net profits of the company, a fixed yearly dividend of Fifty Cents (50¢) per share, payable semi-annually." (Pet. 16)*

Respondent ("Arizona" hereafter) held 10,000 shares of Constantin's preferred, the stock certificate for which also contained this provision, during the entire year of 1955 (Pet. 11). Constantin, however, did not declare or pay a dividend for 1955 (Pet. 11, 13), although, as it conceded in argument in the Court of Appeals after earlier evasiveness on the point (Pet. 18), net profits were available (id.).

On cross-motions for summary judgment on the issue of Constantin's liability for the dividend to Arizona, the District Court ruled in Constantin's favor, the judge expressing the view that notwithstanding the charter provision, a dividend should be payable only in the directors' discretion (Pet. 13). The Court of Appeals reversed, holding the dividend mandatory. This determination, it is submitted, is plainly correct, and it presents no question warranting further review.

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* Citations herein to the petition for certiorari will refer to "Pet." followed by the page number.

Argument

The Court of Appeals, in the light of local statutes and cases, which it punctiliously examined, passed on a question involving the construction of a provision of a certificate of incorporation and stock certificate, instruments contractual in character. Its conclusion was in accordance with the local law. The provision on which it ruled is encountered only rarely in the corporate field, and its decision involves no question of general importance.

1. A reference to the narrow compass of the ruling below will demonstrate that the Court of Appeals correctly applied the law of New Jersey to the problem before it. Cases often arise where a stockholder sues for a dividend which the board is empowered but not required to declare. In such instances the courts hold that a dividend declaration is not compellable unless fraud, bad faith or abuse of discretion is shown. The present case deals with the infrequent situation where the corporation has contractually undertaken to pay dividends if profits are available, as they here were (Pet. 18).

In concluding that this undertaking, whose binding character "(w)ords could not more clearly or plainly manifest" (Pet. 16), overrides directorial discretion and must be honored, the Court of Appeals noted that the New Jersey statute, N.J.S.A. 14:8-1, permits the creation of stock with such "designations, preferences * * * or other special rights" as the charter may express (Pet. 17, n. 10; Pet. 9); that N.J.S.A. 14:8-2 provides that preferred stockholders are entitled to "dividends at such rates, on such terms, and at such times" as the charter may provide (Pet. 17, n. 10); and that N.J.S.A. 14:8-20 authorizes directors to determine dividends in their discretion "unless otherwise provided in the certificate of incorporation * * * ", a qualification

which led the court to the obvious conclusion that such discretion "may be legally contracted away under the law of New Jersey" (Pet. 17, 9).

Mindful of *Erie* v. *Tompkins*, 304 U. S. 64 (1938), and its progeny (Pet. 14, 16), the court scrutinized the New Jersey cases which bore on the subject (id.): *Park* v. *Grant Locomotive Works*, 40 N. J. Eq. 114, 117-18, 3 Atl. 162, 165 (Chancery, 1885), aff'd, 45 N. J. Eq. 244, 19 Atl. 621 (E. & A., 1888); *Fougeray* v. *Cord*, 50 N. J. Eq. 185, 24 Atl. 499 (Chancery, 1892), reversed on other grounds *sub nom. Laurel Springs Land Co.* v. *Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886 (E. & A., 1893); *Stevens* v. *United States Steel Corp.*, 68 N. J. Eq. 373, 377-78, 59 Atl. 905, 907 (Chancery, 1905); and *Wilson* v. *American Ice Co.*, 206 Fed. 736, 738 (D. C. N. J., 1913). The cases, or the language in them, while admittedly not too helpful (Pet. 14), indicated generally, in consonance with other authorities (Pet. 17, nn. 12, 13), that directors' discretion could be limited by appropriate charter provisions.

Constantin, in its petition, has cited to the Court, as it did to the court below, a number of decisions where, in the absence of bad faith factors, directors' refusals to declare dividends were judicially sustained. This is of course the rule where governing instruments confer discretion, either expressly or impliedly, as they did in virtually all the cases on which the petitioner relies (Pet. 5 ff.).* In no case

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*As examples there may be mentioned *Agnew* v. *American Ice Co.*, 2 N. J. 291, 66 A. 2d 330, 332 (1939) (Pet. 5), where preferred dividends were payable "as and when declared by the Board of Directors * * *"; and *Field* v. *Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 1127 (1894) (Pet. 8), where the priority of the preferred dividend over the common dividend was mandatory under the charter, but not the preferred dividend

(Continued on following page)

cited by it, however, was there a mandatory provision comparable in any way to the petitioner's own charter.

The conclusion below "that the Supreme Court of New Jersey, did that tribunal have the instant case before it, would hold that the payment of a dividend for the year 1955 was required of Constantin if there were net profits available" (Pet. 17) was eminently proper. The competence of Courts of Appeals on the law of states within their jurisdictions is well recognized, and the policy of this Court is to leave their rulings in this sphere undisturbed. *Estate of Spiegel* v. *C.I.R.*, 335 U. S. 701, 707-708 (1949); *General Box Co.* v. *United States*, 351 U. S. 159, 165 (1956).

2. The relevance to petitioner's contention of *New York, Lake Erie & Western R.R. Co.* v. *Nickals*, 119 U. S. 296 (1886), cited by it (Pet. 7), is not evident. Of pre-*Erie Tompkins* vintage, the case does not involve New Jersey law. There was no charter restriction on management's discretion; on the contrary, the preliminary agreement for organization made dividends payable "as declared by the board of directors" (119 U. S. at 305). The Court recog-

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itself. In some cases cited by the petitioner, like *In re Evening Journal Assn., Inc.*, 15 N. J. Super. 58, 83 A. 2d 138 (1951) (Pet. 5, 7), the charter provision was of such slight consequence to the issue that it was not mentioned in the opinion. 6 A. L. R. 809 (Pet. 8) cites some old cases where unconditional preferred dividend provisions were judicially rejected or modified, unlike the situation here where the dividends are payable only if there are profits. The conclusion in the note in 39 Ill. L. Rev. 90 (1944) (Pet. 8) that the upholding of the mandatory character of a contractual dividend provision is not approved by a majority of the courts is the result of a failure to inquire into the precise terms of the charter provisions referred to. Analysis shows, on the contrary, that such provisions are followed unanimously. See cases cited Pet. 17, n. 13, and cf. 12 Fletcher Cyc. Corp. §5447.1 (1957 rev.).

nized, furthermore, that the directors' "authority in respect of these matters (referring to dividend declarations) may, of course, be controlled or modified by the company's charter * * * " (at 304), precisely as did the Court of Appeals here.

3. No public interest is affected by the ruling sought to be reviewed. Since, as has been noted, a provision for mandatory dividends out of profits is unusual, the dolorous future consequences to corporate management, to the healthy growth of industry, and to the protection of stockholders' investments attributed to the decision below (Pet. 6-7) are not likely to arise. Nor is the petitioner itself, with net profits at the end of 1955 of over $800,000 (Pet. 18) against an annual dividend requirement of not over $25,000 (Pet. 11 and n. 1) likely to undergo such consequences.

Contrary to the petitioner's assertions (Pet. 8), the ruling below does not confer upon a stockholder the status of a creditor, nor is the equity of the petitioner transformed into debt, for the charter does not undertake to pay dividends in the absence of profits, while debts to creditors must be paid, profits or no.

4. The certiorari procedure was designed to eliminate rather than encourage litigation in this Court concerning the construction of a private instrument. No more than this is here involved. Robertson & Kirkham, *Jurisdiction of the United States Supreme Court* (Wolfson and Kurland ed., 1951), §333, text at n. 1, p. 657; and see Frankfurter and Hart, *The Business of the United States Supreme Court at October Term, 1933*, 48 Harvard L. R. 238, 269 (1934); Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), p. 448.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM ROSSMOORE,
Attorney for Respondent,
Arizona Western Insurance Company.

SAMUEL M. KOENIGSBERG,
Of Counsel.